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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

NO. 1055

R.P.R. CONSTRUCTION COMPANY,
AN ARIZONA CORPORATION,
Petitioner,

vs.

BUSHMAN CONSTRUCTION COMPANY,
A MISSOURI CORPORATION,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW AND STATEMENT OF THE CASE

The Brief of the Petitioner is inaccurate in its Statement of the Case and the presentation of the Questions For Review in that these sections of the Petitioner's Brief are premised upon the assumption that the relationship

between the Respondent and one W. S. Conner was secret and not known to the Petitioner (see Petitioner's Brief, pages 2 through 5). That factual assumption and therefore the Petitioner's legal argmuents premised thereon were found to be inaccurate and inapplicable by the Tenth Circuit Court of Appeals which reviewed the record, sustained the findings of the trial court and specifically stated as follows in holding that the Respondent was entitled to an equitable lien:

> "The evidence establishes without dispute that for over one year R.P.R. sent all of the Conner checks to the Mechanics Bank at St. Joseph, Missouri, where they were endorsed and the money deposited to Bushman's account. Although R.P.R. did not know the details of the contractual relationship between Bushman and Conner, it did know that during this time Bushman used these funds to pay for labor and material furnished to the Conner subcontract, and knew that the 'Direction of Proceeds' instrument was for Bushman's protection. It knew that Bushman had paid out for the benefit of the Conner subcontract, about $500,000.00 more than it had received. R.P.R. knew from conferences with Bushman's representatives that these advances were chargeable to progress payments due. . . .
>
> ". . . Undoubtedly Bushman's contribution to the Conner subcontract was to a large extent responsible for the creation of the fund held by R.P.R." *Bushman Construction Co. v. Conner*, 351 F.2d 681, 684; Petition For Writ of Certiorari, pages 29 through 30.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

1. There Is No Federal Question.

No Federal question of general public importance is involved in the present case and none is urged by the Petitioner in its grounds and reasons for granting a Writ of

Certiorari. Consequently, under the Rules and in view of the Court's heavy docket, the Petition for Writ of Certiorari should be denied. U.S. Supreme Court Rule 19; *Layne & Bowler Corporation v. Western Well Works*, 261 U.S. 387, 393, 67 L.Ed. 712, 714, 43 S.Ct. 422 (1923); *NLRB v. Pittsburg S. S. Co.*, 340 U.S. 498, 502, 95 L.Ed. 479, 482, 71 S. Ct. 453 (1951).

2. Any Conflict Between the Decisions Of The Tenth Circuit and Of The Fourth and Ninth Circuits Is The Result of Permissible Differences in State Laws.

The opinion of the Tenth Circuit Court of Appeals, which is the subject of the Petition for Writ of Certiorari, is based upon the law and pronouncements of the Colorado Supreme Court. The Court of Appeals in the instant case specifically recognized:

> "The trial court's theory of liability is based upon the rule announced in *School Dist. No. 3 v. Central Savings Bank & Trust Co.*, 113 Colo. 487, 159 P.2d 361, and *Mitchell v. Bowman*, 10 Cir., 123 F.2d 445. See also, *Clatworthy v. Ferguson*, 72 Colo. 259, 210 P. 693; *American Agency & Investment Co. v. Gregg*, 90 Colo. 142, 2 P.2d 1101. These cases establish a right in the nature of a lien in favor of one who assists in bringing a fund into existence." 351 F.2d 681, at page 684 (Page 30 of the Petition for Writ of Certiorari)

The Court of Appeals further stated:

> "As we interpret the trial court's conclusion, Bushman had a lien on the funds in possession of R.P.R., and that R.P.R., an experienced contractor, had sufficient notice of the lien to be bound by it. Under the circumstances, unless clearly erroneous, the determinations by the trial court of applicable Colorado law will be upheld." 351 F.2d 681, at page 684 (Page 29 of the Petition for Writ of Certiorari)

The Petitioner argues that in following these Colo-

rado decisions, the opinions of the trial court and the Tenth Circuit Court of Appeals are in "real and embarrassing conflict" with the decisions of the Fourth Circuit Court of Appeals in *Union Trust Company of Maryland v. Townshend*, 101 F. 2d 903 (1939), and with the decisions of the Ninth Circuit Court of Appeals in *U. S. v. Adamant Co.*, 197 F.2d 1 (1952) and *Bullen v. DeBretteville*, 239 F.2d 824 (1956). The Fourth Circuit Court of Appeals applied the law of West Virginia in determining the equitable lien issues in *Union Trust Co. of Maryland v. Townshend*, supra. The Ninth Circuit Court of Appeals based its equitable lien decisions upon the law of the State of California, *U. S. v. Adamant Co.*, supra, and *Bullen v. DeBretteville*, supra.

Therefore, in each instance, the opinions of the Fourth, the Ninth and the Tenth Circuit Courts of Appeals are based upon state law. Any conflict which may be discernible in comparing the holdings of a court in one circuit with the holdings of a court in a different circuit is the result of a permissible difference in state law and is not a conflict for which a Writ of Certiorari is to issue. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 82 L.Ed. 1188, 58 S.Ct. 817 (1938); *Ruhlin v. New York L. Ins. Co.*, 304 U.S. 202, 82 L.Ed. 1290, 58 S.Ct. 860 (1938).

3. There Is No Conflict Between The Opinions Of The Tenth Circuit and Of The Fourth And Ninth Circuits Nor Within The Opinions Of The Tenth Circuit.

There is no inconsistency in the substantive law of the states of West Virginia, Colorado and California regarding equitable liens as announced by the decisions of the Fourth, Ninth and Tenth Circuit Courts of Appeals cited above and in the Petitioner's Brief. In the instant case, as quoted above, the Tenth Circuit Court of Appeals reviewed and upheld the findings and reasoning of the

trial court to the effect that the respondent Bushman Construction Company had expended its funds in payment for labor and material furnished in the performance of the Conner subcontract, that Petitioner R.P.R. knew of this and knew that Bushman had expended $500,000 more than it had received, that R.P.R. knew that the "Direction of Proceeds" was for Bushman's protection, that R.P.R knew Bushman's expenditures were being charged to the progress payments, and that the lien of Bushman was known by R.P.R. and was not secret. *Bushman Construction Co. v. Conner*, 351 F.2d 681, 684 (1965). Upon these facts and findings, the Court upheld Bushman's equitable lien upon the precedents of the Colorado Supreme Court that such a lien may arise out of the relationship, the dealings and the knowledge of the parties for the fair and just protection of one who has expended money in the creation of a fund. (See pages 29 and 30 of the Petition for Writ of Certiorari.) That is the same basis upon which the Fourth Circuit Court of Appeals found that equitable liens were imposed under the law of the State of West Virginia. *Union Trust Co. of Maryland v. Townshend*, supra. The Ninth Circuit Court of Appeals held that equitable liens arose under California law upon the basis of similar facts and findings. *U. S. v. Adamant Co.*, supra at page 10; *Bullen v. DeBretteville*, supra. No inconsistency exists between the opinions of the Fourth, Ninth and Tenth Circuit Courts of Appeals. In each decision applicable state law is held to create an equitable lien under the facts as found by the trial court. Although there are factual differences, there is in no conflict in the law or reasoning of the courts and certainly no conflict reviewable by the United States Supreme Court.

Neither is there a conflict among the opinions of the Tenth Circuit Court of Appeals. That Court has previously upheld equitable liens arising under the laws of the respective states of Wyoming, Oklahoma and Colorado upon the

same basis as in the instant case. *Caldwell v. Armstrong*, 342 F.2d 485 (1965); *Underwood v. Phillips Petroleum Co.*, 155 F.2d 372 (1946); *Mitchell v. Bowman*, 123 F.2d 445 (1941). Furthermore, in ruling upon the lien release in the companion case, *Bushman Construction Co. v. Air Force Academy, Inc.*, 327 F.2d 481 (1964), the Tenth Circuit stated expressly at page 485 that the ruling did not apply to or affect the matters then being litigated in the present case. The Court said:

> "The question whether or not R.P.R. should have paid these sums to another of the joint venturers, and the effect of a document concerning the application of payments, is not here concerned. This is an issue in the compainon case pending in the District Court, and this opinion is not intended to affect such issue in any way." (See Page 39 of the Petition for Writ of Certiorari.)

The issues in the companion case, which is the case at bar, have now been resolved against R.P.R., the present Petitioner. There is no conflict between the decisions rendered by the Tenth Circuit Court of Appeals in this matter, and no reason exists to call upon the United States Supreme Court to exercise its power of supervision.

4. There Is No Question Of General Public Interest Which Merits Review By Certiorari.

The instant case turns on principles of equity and was resolved by the trial court upon the finding that Bushman's lien was not secret and that it arose because of the relationships, dealings, knowledge and expenditures of the parties. The Tenth Circuit Court of Appeals has found that the record supports the trial court and has affirmed its action. The issues are strictly between the parties and are of importance only to them. There is no substantial or significant public interest or consequence in the issues and determina-

tions in this case, particularly since the trial court and the Court of Appeals made their determinations in accordance with accepted precedents and the usual course of judicial proceedings. Consequently, this case does not qualify for review by a writ of certiorari. *Layne & Bowler Corp. v. Western Well Works*, supra; *NLRB v. Pittsburg S. S. Co.*, supra.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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